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Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities

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Comment

SHOULD UNDOCUMENTED ALIENS BE ELIGIBLE FOR RESIDENT TUITION STATUS AT STATE UNIVERSITIES?

Eligibility for resident tuition status at state colleges and universities is generally reserved for lawful residents and citizens only. This Comment analyzes this policy under equal protection doctrine to determine if it unjustifiably discriminates against undocumented alien students.

INTRODUCTION

A permanent underclass of undocumented aliens reside in the United States.[1] Ineffective federal immigration policies and American employers' desire for inexpensive labor sustain its continued existence.[2] Contrary to the popular image of undocumented aliens as transient workers, a substantial number of undocumented families have lived in the United States for many years,[3] becoming Ameri-

1. *See* STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, UNITED STATES IMMIGRATION POLICY AND THE NATIONAL INTEREST 477 (Apr. 30, 1981).

2. *See* Kincaid, *Alternative Outcomes of Reform*, 22 SOC. SCI. & MOD. SOC'Y 73, 73 (1985).

3. Research studies of resident undocumented aliens in interior areas show far longer lengths of stay than aliens apprehended in border areas. Of the undocumented Mexican male migrants apprehended within 25 miles of the southern border in 1979, only seven percent had been in this country for more than six months. On the other hand, a study of unapprehended undocumented aliens interviewed at an immigration counseling center revealed that over 50% had been in the United States for more than three years.

cans in every sense except for their legal status.[4] They have been encouraged to remain in the United States by employers and government agencies that deliberately overlook their immigration status.[5] The undocumented alien population, however, remains largely outside the political system. Consequently, laws and policies aimed at this group must be carefully scrutinized.[6]

This Comment addresses the eligibility rules governing resident tuition status at state universities, focusing on the limitations of the rules and their effect on the undocumented alien population in the United States. Because the discriminatory impact which these rules have on undocumented aliens fails to promote a substantial governmental interest, they violate constitutional equal protection.[7]

THE ELIGIBILITY RULES AT STATE UNIVERSITIES

State universities generally charge higher tuition fees to nonresident students.[8] The difference between resident and nonresident tuition reflects the notion that state universities should be more accessible to those who have contributed to the education system through the tax structure.[9] While out-of-state residents are encouraged to attend these institutions, they are not subsidized by state tax revenue; consequently, they must bear the burden of most college education

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In a study conducted in Orange County, California, researchers discovered that 19% of the aliens interviewed had been living in this country for more than 10 years. *See* STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, *supra* note 1, at 503-04.

4. For example, the Valenzuela family crossed the border years ago and has lived in the United States for 10 years. They own a growing used-tire shop and two cars. They rent a tidy, three-bedroom home in Los Angeles' San Fernando Valley. Their four children maintain B averages in public schools. They pay Social Security and income taxes and keep a clean credit rating. All the family lacks is legal status. *See* Goodgame, *Citizens in All But Name*, TIME, July 8, 1985, at 56.

5. For example, Mr. Valenzuela obtained a permit to sell used tires from a local policeman who knew that the Valenzuelas were illegal immigrants. The police explained that they do not inquire about the status of undocumented aliens to encourage these aliens to come forward if they become victims of crime. Both Mr. and Mrs. Valenzuela secured California drivers' licenses by showing their Mexican birth certificates and by passing a driving test and a written examination in Spanish. When the Valenzuelas registered their cars, they needed no immigration documents. The same was true when they borrowed money from a major California bank. Also, the Valenzuela children were enrolled in Los Angeles public schools without inquiry into their immigration status. *See id.*

6. *See* United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

7. U.S. CONST. amend. XIV, § 1.

8. *See* Education Comm'n of the States, *Survey*, 6 HIGHER EDUCATION IN THE STATES 125, 125-39 (1978) (a complete survey of state regulations affecting resident/nonresident status); Hellmuth, Residency for Tuition Purposes: A Study of the Rules in Use at the Fifty State Universities (1981) (Ph.D. thesis, U. Wis. at Madison, available from University Microfilms Int'l, P.O. Box 1346, Ann Arbor, Mich. 48106).

9. Hellmuth, *supra* note 8, at 5. The Supreme Court recognized that a state has a "legitimate interest in protecting and preserving the quality of its own bona fide residents to attend such institutions on a preferential tuition basis." Vlandis v. Kline, 412 U.S. 441, 452-53 (1973).

expenses themselves.[10]

General uniformity exists among states' rules regarding resident tuition status.[11] Most rely on the concept of domicile—the intent to establish and maintain a permanent home—to determine whether a student is a state resident for tuition purposes.[12] However, due to the subjective nature of "domicile," states generally employ objective criteria to identify such intent.[13] While these criteria vary among states, a one-year residency requirement is imposed in all but six states.[14] Other commonly employed indicia of domicile include place of voter registration, motor vehicle registration, state income tax payment, driver licensing, real property ownership, employment, non-session residence, and source of support.[15] No state has an all inclusive list which automatically confers resident tuition status.[16] Rather, these criteria serve merely as factors considered in making such a determination.[17]

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10. Hellmuth, *supra* note 8, at 5.

11. *Id.* The residency rules at a majority of the state universities are developed under the authority of the governing board of the university. State legislatures, however, develop tuition statutes in 15 states, and higher education coordination boards formulate the regulations in five other states. Two states use combinations of definitive statutory law and policies developed by coordinating boards or regents. At Louisiana State University a memorandum of the President formulates the regulations, and at Pennsylvania State University, the Auditor General of the state develops them. *Id.* at 35-38.

12. BLACK'S LAW DICTIONARY 435 (5th ed. 1979) defines domicile as "that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." The difference between "domicile" and "residence" is clearly distinguished in that "domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling."

Although the definition of domicile is distinguishable from the definition of residence, state universities use both terms to mean the same thing. Whether the term used is domicile, legal residence, bona fide residence, in-state residence or residency for tuition purposes, it is clear that the basis of residency in every state university is synonymous with the legal definition of domicile in the sense of a person's permanent home. Hellmuth, *supra* note 8, at 11.

13. *See* Hellmuth, *supra* note 8, at 38.

14. *See id.* at 36-37. *See also* HIGHER EDUCATION IN THE STATES, *supra* note 8. In *Vlandis*, 412 U.S. at 452, the Supreme Court recognized that the states have the right to impose a reasonable durational residency requirement on a student as one element in demonstrating bona fide residence.

15. Hellmuth, *supra* note 8, at 47. The Supreme Court has looked favorably upon such residency traits as being an aid in reaching residency determinations. *See Vlandis*, 412 U.S. at 453-54.

16. Hellmuth, *supra* note 8, at 38.

17. *See id.* at 47-53. Each of the traits is an attempt to ascertain the establishment of domicile, and therefore, residency for tuition purposes, by inference from certain actions taken by the student within the state and local community of the university. Some factors or actions may imply allegiance to a particular state and lend more credibility to a student's claim; others may appear to have been taken for convenience or legal reasons. For example, the payment of state income taxes in the state in which the univer-

As a prerequisite to being considered for resident tuition status under these objective criteria, applicants must first be "eligible."[18] Thirty-two states have special eligibility rules for aliens.[19] These rules generally preclude eligibility where the visa requires that the alien maintain domicile in the country of origin.[20] If the alien applicant is not required to maintain domicile in the country of origin, the alien is generally "eligible" to pursue a residency claim.[21] However, the majority of aliens enrolled at state universities are students on F visas which require the alien to maintain domicile in the country of origin.[22]

The United States Supreme Court, in deciding *Toll v. Moreno*,[23] invalidated the University of Maryland's policy of denying resident tuition status to G-4 visa holders—those officers and employees of various international organizations who, together with their immediate families, are permitted to enter the country and establish domicile in the United States.[24] The Court held that, given congressional policy which allows G-4 aliens to acquire domicile in the United States, Maryland's policy of denying resident tuition status to G-4 aliens solely on the basis of the alien's federal immigration status was a "burden not contemplated by Congress in admitting these aliens to the United States."[25] This holding, however, left intact the

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sity is located and the avoidance of a more attractive financial option available in another state is usually more persuasive than a local voting record or a driver's license. Because of student appeal for local politics and shortened residency requirements for voting, many students vote in local elections with little thought given to the notion that the voter's permanent home is in the district. In addition, some states require driver licensing if the driver operates a motor vehicle in the state for more than a short time period.

18. Most states have special rules pertaining to minors, students who marry a state resident, military personnel, and aliens. These special rules delineate which students in these groups are allowed to demonstrate "domicile" by meeting the indicia of residency set forth in the rules. *See id.* at 53-61. *See also* HIGHER EDUCATION IN THE STATES, *supra* note 8.

19. Hellmuth, *supra* note 8, at 60. *See also* HIGHER EDUCATION IN THE STATES, *supra* note 8. According to the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1982), originally enacted as the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, an "alien" is defined as "any person not a citizen or national of the United States." *Id.* § 1101(a)(3). Two classes of aliens exist under the Act: immigrant and nonimmigrant aliens. Immigrant aliens are those admitted for permanent residence. *Id.* § 1151(a). Nonimmigrant aliens are those generally admitted only for temporary periods and include students, tourists, diplomats and temporary workers. *Id.* § 1101(a)(15). In addition, aliens may be admitted under the parole power of the Attorney General. *Id.* § 1182(d)(5).

20. Hellmuth, *supra* note 8, at 60.

21. *Id.*

22. 8 U.S.C. § 1101(a)(15)(F) (1982).

23. 458 U.S. 1 (1980).

24. 8 U.S.C. § 1101(a)(15)(G)(iv) (1982).

25. 458 U.S. at 13-14. In reaching its decision in regard to the ability of G-4 visa holders and their dependents to establish domicile in the United States, the Court relied upon its prior decision in similar litigation, Elkins v. Moreno, 435 U.S. 647 (1978). In *Elkins*, the Court noted that Congress had specifically provided that some nonimmigrant

alien eligibility rules applicable to all other visa holders, including those holding F visas.

Undocumented aliens do not possess visas at all; they enter the United States illegally without documentation.[26] Consequently, they are unable to demonstrate domicile as required under the alien eligibility rules.[27] Because these rules are the exclusive means by which aliens are able to achieve eligibility,[28] undocumented aliens are unable to acquire resident tuition status.

This policy was recently challenged in California. Prior to 1983, California law allowed only those immigrants who were lawfully admitted to the United States for *permanent* residency to apply for resident tuition status.[29] Consequently, nonimmigrant aliens,[30] although lawfully admitted, were ineligible to apply.[31] This policy was inconsistent with the Supreme Court's decision in *Toll v. Moreno*, since the policy denied G-4 visa holders eligibility.[32] As a result, California amended its law[33] to allow *all* aliens to apply for resident tuition status unless expressly precluded from doing so by the Immigration and Nationality Act.[34]

While this amendment clearly allowed G-4 visa holders to apply for resident tuition status, it was interpreted by California's universities and colleges to also allow undocumented aliens to apply for resident tuition status.[35] Proponents of this position reasoned that the

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aliens were admitted on the condition that they did not intend to abandon their foreign residence, *e.g.*, visitors to the United States, students, aliens in transit, vessel crewmen landing temporarily, and temporary workers having a foreign country residence. Accordingly, such nonimmigrants could not establish domicile in the United States, absent an adjustment of status. From such specific provisions, the Court implied that other nonimmigrant aliens, such as G-4 visa holders, were capable of becoming domiciliaries of a state. *Id.* at 665-68.

26. Undocumented aliens are immigrants who have entered the United States in a surreptitious manner. According to the Immigration and Naturalization Service (INS), they are classified as persons who have "entered without inspection" (EWIs). They are "undocumented." Briggs, *Methods of Analysis of Illegal Immigration into the United States*, 18 INT'L MIGRATION REV., 623, 623-24 (1984).

27. The rules provide that only aliens with certain types of visas can apply for resident tuition status. *See* Hellmuth, *supra* note 8, at 60. *See also supra* text accompanying notes 20-22.

28. *See* Hellmuth, *supra* note 8, at 60.

29. 67 Cal. Att'y Gen. Op. 241, 242 (1984).

30. *See supra* note 19.

31. 67 Cal. Att'y Gen. Op. at 243.

32. *See id.* at 243-46.

33. *See id.* at 242, 247.

34. *Id.* at 242; 8 U.S.C. § 1101-1153 (1982).

35. *See* Scott-Blair, *Tuition Controversy Has Aliens in a Trap*, San Diego Union, Oct. 1, 1984, at B1, col. 1.

residency laws no longer required aliens to have been "lawfully admitted," and nothing in the Immigration and Nationality Act expressly precludes undocumented aliens from establishing domicile.[36] They further argued that, under prevailing case law, undocumented aliens may establish a domicile of their choice.[37] In *Plyler v. Doe*,[38] the Supreme Court held that "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a state."[39]

Rejecting these arguments, however, the California State Attorney General, in a formal opinion, refused to follow the interpretation of California universities and colleges[40] and ordered undocumented aliens to pay nonresident tuition.[41] In response, five undocumented aliens filed suit against the University of California and California State University challenging this policy on constitutional equal protection grounds.[42] The Superior Court of Alameda County held that the state attorney general's policy of precluding undocumented aliens from eligibility to apply for resident tuition status was unconstitutional.[43] State officials did not appeal this ruling.[44]

The differential between resident and nonresident tuition already exceeds $3000 per year at some state universities.[45] Although the eligibility rules in other states have yet to be challenged, the continuing tuition increases seen each year make future opposition likely.

Undocumented aliens tend to be economically disadvantaged;[46] thus, their attendance at state universities often depends upon their ability to attain resident tuition status.[47] In addition, the number of

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36. 67 Cal. Att'y Gen. Op. at 243.
37. *Id.*
38. 457 U.S. 202 (1982).
39. *Id.* at 227 n.22.
40. 67 Cal. Att'y Gen. Op. at 243-47.
41. *Id.* at 247.
42. *See* Scott-Blair, *supra* note 35.
43. Leticia "A" v. Regents, No. 588-982-5 (Cal. Super. Ct. Apr. 3, 1985).
44. *See* Savage, *State's Campuses Will Admit Illegal Aliens as Residents*, L.A. Times (San Diego ed.), July 24, 1985, § 1, at 3, col. 2.
45. According to a 1975-1976 study, the highest differential between resident and nonresident tuition is at the University of Vermont (a differential of $3660 per year). At 19 state universities the differential is over $2000 per year, at 16 universities the differential is over $1500 per year, and at 11 universities the differential is over $1000 per year. Four state universities did not differentiate between residents and nonresidents in the amount of tuition charged. *See* Hellmuth, *supra* note 8, at 62-63.
46. All studies of undocumented aliens have noted their low and uncertain pay. Bean, Browning & Frisbie, *The Socio-Demographic Characteristics of the Mexican Immigrant Status Groups: Implications for Studying Undocumented Mexicans*, 18 INT'L MIGRATION REV. 672, 687 (1984).
47. For a discussion of the dependency of minority and working class students on low college tuition, see AM. ASS'N OF COMMUNITY AND JUNIOR COLLEGES & AM. ASS'N OF STATE COLLEGES AND UNIVS. & NAT'L ASS'N OF STATE UNIVS. AND LAND GRANT COLLEGES, LOW TUITION FACTBOOK: EIGHT BASIC FACTS ABOUT TUITION AND EDUC. OPPORTUNITY 11-13 (1983).

undocumented aliens seeking admission to state universities is likely to increase. The undocumented population is predominantly young,[48] and most children of undocumented aliens have yet to reach college age. The group now applying for college represents the vanguard of undocumented aliens advancing through the public school system.

In reviewing the eligibility rules for resident tuition status at state universities, courts must decide whether the preferential treatment afforded lawful permanent residents and citizens[49] over undocumented aliens is constitutionally permissible.

EQUAL PROTECTION

General Rules

The United States Constitution guarantees "any person" within the jurisidiction of the United States equal protection of the laws.[50] Neither a state nor the federal government[51] may enact laws which discriminate against any discrete group or classification of people, including aliens,[52] without adequate justification. Although government-imposed classifications are not prohibited per se under constitutional equal protection guarantees,[53] such classifications must support a state interest.

Laws challenged on the basis of constitutional equal protection are reviewed by courts under varying standards, depending upon the nature of the classification, the rights involved, and countervailing con-

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48. *See* A. PORTES & R. BACH, LATIN JOURNEY 127 (1985).

49. BLACK'S LAW DICTIONARY 221 (5th Ed. 1979), referring to the fourteenth amendment of the United States Constitution, defines a citizen as:

> One who, under the constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

Lawful permanent residents are immigrants, not yet citizens of the United States, who have been admitted under the Immigration and Nationality Act, *codified at* 8 U.S.C. §§ 1101-1503 (1982), for permanent residence. *See also supra* note 19.

50. U.S. CONST. amend. XIV, § 1.

51. While the fourteenth amendment explicitly imposes this mandate on the states, the due process clause of the fifth amendment has been interpreted to include a similar mandate for the federal government. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976).

52. Since the equal protection clause refers to "persons" and not "citizens," any alien, regardless of the legality or illegality of his immigration status, is entitled to constitutional protection from discrimination if he is physically present within the jurisdiction of the United States. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

53. *See, e.g., Mathews*, 426 U.S. at 78 (alienage-based distinctions in federal welfare programs upheld under minimal scrutiny).

stitutional concerns. "Minimal scrutiny" is generally the standard used to review those laws whose classifications neither affect a "suspect class" nor infringe upon "fundamental rights."[54] However, when a classification either affects a suspect class[55] or infringes upon a fundamental right,[56] courts generally apply "strict scrutiny." Under this standard of review, the legislative purpose of the classification must be "compelling."[57] Furthermore, the classification must be closely related to that purpose and necessary to its achievement.[58]

In more recent decisions, the Supreme Court has also developed "intermediate" standards of review.[59] Different intermediate standards have been applied to various classifications, which, although not "suspect," are nevertheless sufficiently invidious to warrant "heightened scrutiny."[60] The Court has yet to clarify whether these intermediate standards of review are triggered by the nature of the classification, the right protected, or a combination of both.[61] Although these parameters remain relatively unidentified,[62] it is clear that the state interest involved falls somewhere between the deferential minimal scrutiny and the strict scrutiny standard of review. Classifications which fall within this intermediate area must generally be "*substantially* related to a legitimate state goal" to survive constitutional equal protection challenge.[63]

Despite the differences in judicial review standards, the essence of equal protection claims remains constant: equal protection under the law is denied whenever the discriminatory impact of a classification does not advance a state interest, and/or is the product of improper

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54. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) (minimal scrutiny applies since welfare is not a fundamental right).

55. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race; antimiscegenation laws).

56. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to interstate travel).

57. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 193 (1964) (even if preserving "sexual decency" is a legitimate state interest, it is not "essential to punish promiscuity of one racial group and not another").

58. Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1519 (1979).

59. The Supreme Court has employed intermediate review primarily in gender-based discrimination cases, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976), and in cases involving discrimination against illegitimate children, *see, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978). The Court reserved the question of whether mentally ill persons are a suspect or semi-suspect class in Schweiker v. Wilson, 450 U.S. 221, 231 n.13 (1981), but some lower federal courts have specifically discussed the issue. *Compare* Doe v. Colautti, 592 F.2d 704, 710-12 (3d Cir. 1979) (mentally ill not a suspect class) *with* Cleburne Living Center v. City of Cleburne, Tex., 726 F.2d 191, 196-200 (5th Cir. 1984) (mentally retarded persons a quasi-suspect class).

60. *See* Note, *supra* note 58.

61. *See* Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differentials*, 9 J. C. & U. L. 241, 244 (1982).

62. *Id.*

63. *Id.*

motives.[64] Where suspect and invidious classifications and fundamental rights are *not* affected, minimal scrutiny is employed as a matter of deference to legislative decisionmaking[65] and state sovereignty under notions of federalism.[66] Consequently, when minimal review is applied, the courts often consider purposes not actually advanced by the legislature, often rationalizing a nexus between the challenged classification and any conceivable legislative purpose.[67] Conversely, when suspect groups or fundamental rights are involved, courts are often unwilling to validate the expressly stated legislative purposes and facts offered to justify the challenged classification scheme.[68]

In any challenge, the judicial test employed generally determines the outcome of the case.[69] The vast majority of statutes survive constitutional challenge when minimal scrutiny is employed;[70] few survive strict scrutiny.[71]

The Appropriate Standard

Aliens were first recognized as a suspect class in *Graham v. Richardson.*[72] The Court in *Graham* held that states may not condition receipt of state-funded public assistance on citizenship or long term residence without violating the equal protection clause.[73] The Court noted that aliens are a "prime example of a 'discrete and insular' minority," and determined that state classifications[74] based on alien-

64. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 993-94 (1978).
65. *Id.* at 995-96.
66. *See infra* note 74 for an explanation of the dual standard approach between federal and state classifications regarding alienage.
67. *See* Note, *supra* note 58.
68. *See id.* at 1519-20.
69. Lines, *supra* note 61, at 244.
70. *See, e.g.*, cases cited *supra* notes 53-54. Under minimal review, these classifications were upheld. *See also* Lines, *supra* note 61, at 244.
71. *See Loving*, 388 U.S. at 1. Under strict scrutiny, this classification was struck down. *See also* Lines, *supra* note 61, at 244-45. *Compare* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (held unconstitutional to deny admittance into all-female nursing school on the basis of gender) *with* Califano v. Webster, 430 U.S. 313 (1971) (held constitutional a social security provision that provided higher monthly old-age benefits for retired female wage earners than for males). *See also* Lines, *supra* note 61, at 244.
72. 403 U.S. 365 (1971).
73. *Id.* at 365.
74. The states' power to classify on the basis of alienage is considerably more limited than the power vested in the federal government. Although the Court requires the states to demonstrate a compelling interest for their alienage classifications, the federal government is required only to demonstrate a rational basis for its alienage classifications. Some commentators have attributed this dual standard approach for alienage classifications as a reflection of the extraordinary judicial deference given to the federal gov-

age are inherently suspect and subject to close judicial scrutiny.[75]

Under *Graham*, states cannot discriminate against lawfully admitted aliens.[76] The constitutionality of excluding *undocumented* aliens, however, is far less certain. In *Plyler v. Doe*,[77] a Texas statute denying educational benefits to the minor children of undocumented aliens was challenged as unconstitutional on equal protection grounds. The Supreme Court held that undocumented aliens are not a suspect class since they are members of the class through their own volition and in violation of federal immigration laws.[78] While the *Plyler* court was unwilling to characterize undocumented aliens as a suspect class, it nevertheless found they were a "disfavored group."[79] This characterization is consistent with the Court's traditional view that suspect classes are those composed of the politically helpless who require protection from the majoritarian political process.[80] Undocumented aliens are likely to remain outside the political system not only because they are members of a minority immigrant group, but because they fear detection[81] and are generally passive recipients of government policies aimed at them.[82] Consequently, the status of the undocumented alien population as an underclass in American society is likely to remain unchanged.[83]

A suspect class was not involved in *Plyler*; thus, the Court was left with a fundamental right as the only basis upon which it could apply strict scrutiny in reviewing the Texas law. Education has not qualified as a fundamental right;[84] however, the Court has distinguished education from other optional benefits which serve to elevate the sta-

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ernment's power to define the national community. The federal government's interest in emphasizing the difference between citizens and aliens—for example, giving preference to citizens in order to encourage aliens to naturalize and thus join the national community—is generally deemed compelling. *See, e.g.*, Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 24 (1984).

75. 403 U.S. at 372.

76. *Id.*

77. 457 U.S. 202 (1982).

78. *Id.* at 219 n.19.

79. *See id.* at 222.

80. *See, e.g., Carolene Products*, 304 U.S. at 152-53 n.4.

81. Briggs, *supra* note 26, at 625; M. GARCIA Y GRIEGO, THE BORDER THAT JOINS 43 (P. Brown & H. Shue trans. 1981).

82. *See* M. GARCIA Y GRIEGO, *supra* note 81, at 43. The author states that because undocumented aliens fear detection, they are often reluctant to seek legal remedies for wrongs done them, or to apply for welfare services. As a result, they are in a position to be exploited, robbed and blackmailed. The erosion of undocumented aliens' human rights is unavoidable when there is no contact with government agencies. *See also* A. PORTES & R. BACH, *supra* note 48, at 344-45, for a discussion of how immigrants in general have been passive recipients of government policies toward them. Despite their presentation as benign, these policies have been guided by theoretical orthodoxy, the tenets of which have proved empirically wrong.

83. *See Plyler*, 457 U.S. at 218-19.

84. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

tus of the poor.[85] The Court has viewed education as vital to our democratic system; its denial generates cumulative injuries which have an effect similar to electoral barriers.[86] Denying education adversely effects not only our democratic system, but also individuals who are permanently stigmatized by illiteracy.[87]

In *Plyler*, the Supreme Court implied both that education is a quasi-fundamental right and that undocumented aliens comprise a semi-suspect class.[88] However, Justice Brennan, writing the majority opinion in *Plyler*, stated that "more is involved in this case than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right."[89] Because the statute imposed a "lifetime of hardship on a discrete class of children not accountable for their disabling status," the Court concluded that the discriminatory treatment had to be justified by a substantial state interest.[90]

Plyler seems to focus on the legal "innocence"[91] of the undocumented children. While heightened scrutiny could not be invoked on "innocence" alone,[92] characterization of undocumented aliens as a "disfavored group" seems to provide the colorable claim of discrimination necessary to warrant its application.

The heightened scrutiny employed in *Plyler* finds support in the Court's decisions involving classifications based on illegitimacy.[93] In these cases, the Supreme Court has relied on the notion that society's condemnation of illegitimacy should not be imposed upon children who have no responsibility for and no control over their illegitimate status.[94] The Court has recognized that "imposing disabilities

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85. *See Plyler*, 457 U.S. at 221.
86. *See id.* at 233-34 (Blackmun, J., concurring).
87. *See Plyler*, 457 U.S. at 222.
88. *See supra* text accompanying notes 79 and 85.
89. *See Plyler*, 457 U.S. at 223.
90. *See id.* at 223-24.
91. *See id.* at 244-45 (Burger, C.J., dissenting).
The Court seemed to assume that undocumented alien children could not be prosecuted under 8 U.S.C. § 1325, which prohibits an alien's entry into the United States by fraud or without authority of an immigration officer. Even though deportable, the children were "innocent" under traditional concepts. *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 133 n.29 (1982-83).
92. *Plyler*, 457 U.S. at 245 (Burger, C.J., dissenting). The equal protection clause does not "eradicate every distinction for which persons are not 'responsible.' "
93. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 770 (1970); Lalli v. Lalli, 439 U.S. 259 (1978).
94. Although illegitimate children are not a suspect class, illegitimacy classifications must be rejected "if they are not substantially related to permissible state interests." *Lalli*, 439 U.S. at 265.

on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[95]

The Court has generally required a substantial state interest in illegitimacy-discrimination cases even when only economic benefits are at stake.[96] This is true of gender-based discrimination cases as well.[97] By requiring a "substantial state interest" in these cases despite the absence of an "important" benefit such as education,[98] the Court implicitly considers both illegitimacy and gender as more suspect than undocumented alien status. However, Justice Powell suggests, in his concurring opinion in *Plyler*, that the Court's decision would also apply to welfare benefit cases, stating: "[i]f the resident children of illegal aliens were denied welfare assistance, made available by the government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status."[99]

The California Supreme Court applied the *Plyler* rationale to strike down a state policy which discriminated against children of undocumented aliens by limiting the amount of AFDC[100] funds they could receive.[101] Like the children in *Plyler*, these children were "innocent" with respect to their undocumented status.[102] The challenged classification deprived eligible citizen children of benefits based upon the *status* of their undocumented parents.[103] Similarly, a federal district court decision held that New York state could not victimize citizen children or lawful resident children by depriving them of day care services based solely upon the mother's undocumented status.[104]

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95. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

96. *See* Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

97. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977).

98. *See supra* text accompanying notes 84-87.

99. *Plyler*, 457 U.S. at 239 n.3.

100. Aid to Families With Dependent Children.

101. Darces v. Wood, 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984). The State Department of Social Services (DES), pursuant to its duty to implement the AFDC program in California, established the policy that the family budget unit would be limited to citizens, lawful permanent residents, and aliens residing in the United States "under color of law." Therefore, undocumented aliens were excluded from the family budget unit for purposes of determining the amount of the AFDC grant. *Id.* at 877 n.3, 679 P.2d at 462 n.3, 201 Cal. Rptr. at 811 n.3.

102. *Id.* at 892, 679 P.2d at 472, 201 Cal. Rptr. at 821.

103. *Id.* at 888, 679 P.2d at 468, 201 Cal. Rptr. at 818.

104. Ruiz v. Blum, 549 F. Supp. 871 (S.D.N.Y. 1982). The court rested its decision on the rationale that the denial of day care benefits based solely on the mother's status was an impermissible condition inconsistent with the underlying purpose of the Social Security Act provision that eligible children receive day care services. *Id.* at 877.

The common underpinning of the above cases—that "innocent" children are not to be held accountable for their status of birth—also applies to resident tuition status eligibility rules which discriminate against undocumented aliens. These eligibility rules affect young adult students who bear no culpability for their parents' decision to illegally immigrate to the United States. Most of the students now applying for college have resided in the United States for many years.[105] They have attended public schools and are academically qualified to attend state universities.[106] Penalizing these "innocent" students is a meaningless deterrent to the illegal immigration of their parents[107] and is unfair to the students themselves.

Under equal protection analysis, however, the eligibility rules for resident tuition status must do more than discriminate against students who bear no culpability for their "disabling" status to justify the heightened scrutiny in judicial review. An unavoidable stigmatizing effect is also necessary.[108] The undocumented status of these alien students, combined with the effects resulting from a limited education, results in such a stigma. Although the eligibility rules create only an economic disadvantage in gaining access to state-sponsored education, they have the practical effect of denying a higher education to undocumented aliens who are unable to pay the higher out-of-state tuition.[109] Thus, the rules discriminate against a "disfavored group" of definable "poor persons."[110]

While a "lifetime of hardship"[111] is more likely to result from a lack of elementary and secondary education, the effects of denying undocumented aliens a higher education are substantial in light of the increasing importance of higher education in American society. Dr. Benson, the expert witness in *Leticia "A" v. Regents*,[112] testified that "a college education is as necessary to a young person living in 1984 as was a high school education fifty years ago."[113] More than

105. *See* Scott-Blair, *supra* note 35. *See also* Scott-Blair, *Five Reasons for Class Action Against State School System*, San Diego Union, Oct. 1, 1984, at B2, col. 1.
106. *See* Scott-Blair, *supra* note 35.
107. *See infra* note 123 and accompanying text.
108. *See supra* note 92 and accompanying text.
109. *See supra* notes 45-47 and accompanying text.
110. While the Supreme Court, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 22, 35 (1973), rejected the idea that education is a fundamental right, it seemed to reserve the question whether a total denial of education to an identifiable class of resident children would require strict scrutiny.
111. *Plyler*, 457 U.S. at 223.
112. No. 588-982-5 (Cal. Super. Ct. Apr. 3, 1985).
113. *Id.* at 10-11.

fifty percent of the college age population in California is now in college, and employers are filling positions which have traditionally required only a high school degree with college graduates.[114] People who lack a higher education are more prone to be unemployed or to earn low wages.[115]

Higher education benefits both the individual and society.[116] It plays a vital role in providing a source of innovation and renewal in today's technological world.[117]

The underrepresentation of Hispanics in institutions of higher learning is a growing concern.[118] Due to the growing Hispanic population, entire communities will increasingly depend upon Hispanics for leadership in future years.[119] Because the majority of undocumented aliens are Hispanic,[120] denying higher education to undocumented aliens has increased significance.

On this basis, higher eduation for undocumented aliens is an "important" interest deserving heightened scrutiny when it is denied. Courts should employ heightened scrutiny to review the constitution-

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114. *Id.*

115. *Id.*

116. CARNEGIE COMM'N ON HIGHER EDUC., A DIGEST OF REPORTS OF THE CARNEGIE COMMISSION ON HIGHER EDUCATION 195 (1974).

117. *Id.*

118. Payan, Peterson & Castille, Access to College for Mexican-Americans in the Southwest: Replication After 10 Years 8-14 (1984). This survey conducted by the College Entrance Examination Board reviews four major reports on the experience of Mexican-Americans and Hispanics in American schools and colleges. *See also Hispanic Student Potential 'Wasted,' Says Study*, HISPANIC LINK WEEKLY REPORT, Dec. 17, 1984, at 1. This study reveals a 19% national Hispanic high school dropout rate (compared to 17% for blacks and 12.5% for whites). Few Hispanics who drop out of high school ever return to school and even fewer ever enter college. J. Harrison & K. Pailthorp, Presentation of the California Postsecondary Education Commission to the University of California-Sponsored Conference on Educational Underachievement in Linguistic Minorities at Granlibakken, Tahoe City (May 31, 1985) (available from the California Postsecondary Education Commission, 1020 12th Street, Sacramento, CA 95814). It was revealed that 84.7% of the California public high school Hispanic graduates were ineligible for admission into either the California State University or the University of California. Only 10.4% were eligible for the California State University and only 4.9% were eligible for the University of California.

119. *Hispanic Student Potential 'Wasted,' Says Study*, *supra* note 118, at 2.

120. Of the 2.06 million undocumented aliens estimated to have been counted in the 1980 census, almost 55% of the total is from Mexico, and no other country group (*i.e.*, estimation area) accounts for even five percent of the total. Another large group of undocumented immigrants (7.1%) comes from Cuba, the Dominican Republic and specified Caribbean countries (*i.e.*, Haiti, Jamaica, Trinidad and Tobago). Another major source area is Central America and the balance of the Caribbean (8.6%). *See* Passel & Woodrow, *Geographic Distribution of Undocumented Immigrants; Estimates of the Undocumented Aliens Counted in the 1980 Census by State*, 18 INT'L MIGRATION REV. 642, 651, 654 (1984).

Reports cited in the Payan, Peterson & Castille survey, *supra* note 118, revealed that for Chicanos (Mexican-Americans): 55% graduate from high school (compared to 85% of whites); 7% complete college (whites, 23%); 4% enter a postgraduate school; and 2% complete graduate or professional school (whites, 8%).

ality of resident tuition status eligibility rules under the equal protection doctrine; discriminatory treatment disfavoring undocumented aliens should be justified by a substantial state interest to survive constitutional challenge.

Applying Heightened Scrutiny

The eligibility rules for resident tuition status do not further a substantial state purpose. The Court in *Plyler*, clearly rejected the state's contention that justification for discrimination against undocumented aliens need not be provided because the presence of undocumented aliens in the United States is discouraged by federal policy.[121] After noting that the *federal government* has broad authority to classify on the basis of alienage, the Court observed that: "The state may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the state must demonstrate that the classification is reasonably adaptable to 'the purposes for which the state desires to use it.' "[122]

The right to higher education bears no relationship to the presence of undocumented persons in the country. The Court, in *Plyler*, found that undocumented aliens are not lured to the United States to obtain public education for their children;[123] they are certainly not coming on the chance that they or their children will be admitted to a state university with resident tuition status.

Similarly, the states' interest in preserving state treasury funds for lawful residents and citizens is not substantial enough to justify a discriminatory policy disfavoring undocumented aliens. Although conserving financial resources is a sufficient justification for statutory classifications under minimal scrutiny,[124] it is not so in the area of suspect and semi-suspect classifications.[125]

Classification schemes involving suspect and semi-suspect classes generally cannot be justified on the basis of administrative convenience.[126] When a statute *conclusively* denies benefits to one subclass while at the same time grants the same benefits to another, courts

121. 457 U.S. at 224-26.
122. *Id.* at 226 (quoting Oyama v. California, 332 U.S. 633, 664-65 (1948)).
123. *Id.* at 228. Numerous studies show that the dominant motive for illegal immigration is employment. *See, e.g.*, Fogel, *Twentieth-Century Mexican Migration to the United States*, in THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 200 (B. Chiswick ed. 1982).
124. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).
125. *See, e.g.*, Graham v. Richardson, 403 U.S. 374-75 (1971).
126. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

will strike the statute down where its sole justification is based upon administrative convenience.[127] However, when the classification scheme is used merely as an *indication* of eligibility for a benefit, administrative convenience is a sufficient justification.[128] Because the eligibility rules of resident tuition status conclusively deny undocumented aliens the opportunity to demonstrate domicile while lawful residents and citizens are automatically eligible to apply, administrative convenience cannot justify the classification of illegal aliens in tuition status regulations.

Assuming that the state policy of restricting employment of undocumented aliens is a proper legislative goal,[129] the focus then becomes the relevance of that legislative goal to the eligibility rules. Higher education generally enhances employment opportunities. Yet these rules which effectively deny a higher education to undocumented aliens still leave undocumented aliens competing with lawful residents and citizens for low paying jobs. In addition, many of today's undocumented students will eventually become lawful citizens[130] who will then be eligible for welfare[131]—a condition made more likely by the eligibility rules.

Not only do the eligibility rules fail to serve an important state interest, they are also inconsistent with the underlying purpose of the rules themselves. Resident tuition rules are designed to preserve state universities for those residents who have contributed to the educational system through the tax structure.[132] This purpose is accomplished by requiring students to prove domicile.[133] The rules presume that undocumented aliens are transient people. Yet, available socio-

127. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (Texas law denying the right of paternal support to illegitimate children while granting it to legitimate children violates equal protection).

128. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 511-16 (1976) (presumption of dependency for the purpose of receiving survivor's benefits under the Social Security Act was withheld from illegitimate children only in the absence of any significant indication of the likelihood of actual dependency; equal protection not violated when justified by administrative convenience). *But cf. Frontiero*, 411 U.S. at 688 (married woman in the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members; equal protection violated when justified by administrative convenience).

129. In De Canas v. Bica, 424 U.S. 351 (1976), the Supreme Court upheld California Labor Code § 2805(a) which prohibited an employer from knowingly employing an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers. The State's program reflected Congress' intention of prohibiting employment of all aliens except those possessing a grant of permission to work in this country. *Id.* at 361.

130. *See infra* text accompanying notes 136-38.

131. Nearly all the major federal social welfare programs are limited to citizens, lawful permanent residents, and aliens residing in the United States "under color of law." Jakes, *Equal Protection for Aliens in Employment and Benefit Programs*, 2 IMMIGRATION L. REP. 4, 174 (1983).

132. *See supra* text accompanying note 9.

133. *See supra* text accompanying notes 13-14.

economic studies of undocumented aliens indicate the contrary. The undocumented alien population is composed of many settled nuclear families[134] who pay taxes and contribute to states' economies.[135] Although not every undocumented alien would qualify for resident tuition status, the vast majority who apply would satisfy the indicia of domicile set forth in the rules. Thus, automatic exclusion of all undocumented aliens from eligibility for resident tuition status is, in this sense, arbitrary and over-broad discrimination.

The eligibility rules also presume that undocumented aliens cannot legalize their immigration status. Although undocumented aliens are subject to deportation at any time, deportation is within the discretion of the Attorney General.[136] Moreover, it can take many years before residency applications are finally processed by the Immigration and Naturalization Service.[137] Many immigrants spend this time, albeit unlawfully, within the United States.[138]

In sum, state policies which bar undocumented aliens from establishing resident tuition status, even for those who have resided in the state for many years and who intend to remain, fail to correspond in a legally sufficient manner with any substantial state interest. The eligibility rules governing the ability of undocumented aliens to acquire resident tuition status are, therefore, unconstitutional.

CONCLUSION

Immigration reform has moved at a snail's pace in the United States. As a result, inequities abound. Although the nation's policies encourage the presence of undocumented aliens, those who have lived in the United States for many years are still unable to take advantage of many opportunities available to other residents. Lacking representation in the political community in which they live, their "disfavored" status as an underclass is self-perpetuating. Be-

134. *See* Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L MIGRATION REV. 740, 745 (1984). *See also* Texas Population Research Center, Paper No. 4.008, The Migration of Indocumentados as a Settlement Process: Implications for Work 12-15 (1982). For statistics on lengths of stays in the United States, see *supra* note 3, and for an example of a settled undocumented alien nuclear family, see *supra* note 4.

135. A. BUSTAMENTE, MEXICAN IMMIGRANT WORKERS IN THE UNITED STATES 99 (1981). *See also* Golden, *Study Shows Illegal Mexicans Pay Taxes*, San Diego Union, May 4, 1985, at A1, col. 1.

136. *See, e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1982).

137. *See* A. FRAGOMEN, A. DEL REY & S. BERNSEN, IMMIGRATION LAW AND BUSINESS 3-4 (1984).

138. *See* Briggs, *supra* note 26, at 624-25.

cause of this "disfavored" status, state policies discriminating against undocumented aliens must be carefully scrutinized. One such state policy is the eligibility rules for resident tuition status at state universities which preclude undocumented aliens from acquiring resident tuition status solely on the basis of their federal immigration status.

Under equal protection analysis, the predicates for employing heightened scrutiny are present in the state resident tuition eligibility rules which discriminate against "innocent" undocumented alien students who are not accountable for their "disabling status."

Although undocumented aliens do not reside in the United States legally, young adult undocumented students bear no culpability for this illegal activity. Yet these students are stigmatized by the eligibility rules which effectively deny them the opportunity for higher education, an injury enhanced by their "disfavored" status. Under heightened scrutiny, the eligibility rules are unconstitutional; any "substantial" state interest these rules could possibly support has yet to be identified.

Many states have implicitly incorporated federal immigration laws into their own state policies to prescribe resident tuition status eligibility rules without any regard to the resulting effects on a group of people who are in most cases domiciliaries of the state. The uncontroverted evidence shows that substantial numbers of undocumented aliens have lived in the United States for many years and exhibit the traditional characteristics of settled families. These families are similar in every respect to lawful residents except for their immigration status. They contribute both to our national economy as well as our tax base. The rules which automatically exclude undocumented aliens from eligibility for resident tuition status at state universities and colleges, a right granted to all other citizens, are arbitrary and overinclusive. Since there is no identifiable justification for depriving undocumented alien students the opportunity for higher education, the resident tuition eligibility rules violate the equal protection clause of the fourteenth amendment of the United States Constitution.

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